IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 95 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KANUBHAI GAFURBHAI RATHOD & 4 Ors.

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 95 of 1997
MR KJ SHETHNA for appellant.
MR AY KOGJE, APP, for Respondent-State

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 01/09/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Five appellants have filed instant appeal under Section 374 of the Code of Criminal Procedure, 1973 and challenged legality of judgment and order dated December 10, 1996, rendered by the learned Additional Sessions Judge, Ahmedabad (Rural), Mirzapur, in Sessions Case No. 237 of 1994, by which they are convicted under Section 302 read with Section 149 of the Indian Penal Code as well as under Section 324 read with Section 149 of the Indian Penal Code, whereas the appellant Nos.1 to 4 are convicted of the offence punishable under Section 148 of the Indian Penal Code and all the appellants are sentenced to suffer imprisonment for life for the offence punishable under Section 302 read with Section 149 I.P.C. as well as R.I. for one year for the offence punishable under Section 324 read with Section 149 I.P.C. and appellant Nos.1 to 4 are sentenced to suffer R.I. for one year for the offence punishable under Section 148 I.P.C. It may be stated that the substantive sentences in case of each appellant are ordered to run concurrently.

2. Dansingbhai Nathabhai is a resident of village Kavitha, Taluka : Dholka, District : Ahmedabad. He is an agriculturist and owns a field known as "Gayjawala" located in the sim of village Kavitha. He had four sons, namely, (i) Pratapsinh, (ii) Mahobatsinh, (iii) Udesinh, and (iv) Himatsinh. In the morning of May 6, 1994, Pratapsinh and Udesinh with their two labourers i.e. Dhanjibhai Mavjibhai and Ramanbhai Somabhai had gone to the said field for sowing sugarcane crop. At about 8.00 A.M., appellant Nos.1, 3 & 5 had come in a tractor for going to the field of appellant No.1 and in that process, had damaged sugarcane crop, as a result of which there was exchange of words. All the three accused had gone away and administered threats to Pratapsinh and Udesinh. At about 11.00 A.M.,complainant Dansingbhai Nathabhai had come to his field and was informed as to what had happened at 8.00 A.M. in the morning. At about 1.00 P.M. Pratapsinh had gone to village Kavitha for the purpose of bringing tea for those persons who were working in the field and had returned back in the tractor to the field at about 1.30 P.M. At about 2.00 P.M., all the appellants had come in a tractor which was driven by the appellant No.5. After alighting from the tractor, appellant No.3 had given two knife blows to Pratapsinh. On seeing that his brother was being assaulted, Udesinh had come to his rescue, but the appellant No.5 had caught hold of him; whereas appellant No.4 had given knife blows

to him. Dansingbhai Nathabhai on witnessing that his two sons were assaulted had tried to intervene, but appellant No.1 Kanubhai had given two dharia blows on his head and leg; whereas appellant No.2-Dhirubhai had aimed a dharia blow on his head, but,Dansingbhai had raised his hand in defence and therefore, blow had landed on his elbow. On commotion taking place, two labourers, who were working in the field, had come where the three persons were being assaulted and, therefore, appellant No.1 had taken out revolver and attempted to fire a shot, but could not succeed. Thereafter, all the appellants had boarded the tractor in which they had come. It was driven by appellant No.5, and all the appellants had run away from the scene of offence with their respective weapons.

The two labourers had lifted and placed two sons of the complainant and the complainant himself in the tractor which was brought by Pratapsinh before the incident had taken place. It may be stated that distance between the field and the house of complainant Dansingbhai which is situated in village Kavitha, is roughly 1 K.M., and when the injured were being brought to the village, at the outskirts of the village, Himatsinh who is son of the complainant had met. Himatsinh had informed the labourers that he was making arrangement for Matador for removing the injured to Hospital for treatment. Himatsinh had made arrangement for Matador in which injured were removed to V.S.Hospital, Ahmedabad at about 4.00 P.M. The doctor on duty, who had examined the two sons of the complainant i.e. injured Pratapsinh and injured Udesinh, had declared that they were brought dead, and advised the labourers and the complainant to go to Civil Hospital. Therefore, in a Van, two dead bodies and injured complainant were removed to Civil Hospital, where the complainant was admitted in the hospital for treatment. After treatment of the complainant was started, an information was conveyed at Bavla Police Station from Ahmedabad Rural Control on telephone to the effect that a quarrel had taken place at village Kavitha wherein three persons were injured and were admitted in Civil Hospital, but two had died. On receipt of information, Mr. T.S.Patel, who was then Police Sub Inspector of Bavla Police Station, had gone to village Kavitha and arranged bandobast. Thereafter, he had gone to Civil Hospital and recorded complaint of Dansingbhai Nathabhai. The complaint given by Dansingbhai was sent to Bavla Police Station for registration and after registration, investigation into the case was made by Mr.T.S.Patel. He had recorded statements of witnesses, who were found conversant with the facts of the case and prepared

panchnama of place of incident. Further, he had also recovered the weapons used by the accused on the basis of information given by them and sent incriminating articles to Forensic Science Laboratory for analysis. On completion of investigation, the appellants were chargesheeted in the Court of learned Judicial Magistrate, First Class, for the offences punishable under Section 302 & 307 of the Indian Penal Code. As the offences punishable under Sections 302 & 307 of the Indian Penal code are exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Ahmedabad for trial, where it was numbered as Sessions Case No. 237 of 1994.

3. The learned Additional Sessions Judge, Ahmedabad (Rural), Mirzapur, had framed charge against the appellants at Exh.8 for the offences punishable under Section 302 read with Section 149 of the Indian Penal Code and under Section 324 read with Section 149 of the Indian Penal Code. Appellant Nos.1 to 4 were also charged of the offence punishable under Section 148 of the Indian Penal Code. The charge was read over and explained to the appellants, who had not pleaded guilty to the same. Therefore, in order to prove its case, the prosecution had examined, (1) injured complainant Dansingbhai Nathabhai, PW.1 at Exh.16, (2) Prahladbhai Bhagvanbhai Patel, PW.2 at Exh.17, (3) Eye witness Dhanjibhai Mavjibhai, PW.3 at Exh.21, (4) Eye witness Ramanbhai Somabhai, Pw.4 at Exh.22, (5) Dasharathbhai Popatbhai, PW.5 at Exh.23, (6) Dinubhai Fulabhai Rathod, PW.6 at Exh.26, (7) Kushalsinh Bhagvanbhai, PW.7 at Exh.28, (8) Ishwarbhai Nathabhai, PW.8 at Exh.32, (9) Executive Magistrate Rajnikant Prahladji Trivedi, PW.9 at Exh.34, (10) Gulam Dastniy Gulam Husen, PW.10 at Exh.36, (11) Dr.Ganesh Pyarelal Govekar, PW.11 at Exh.40, (12) Dr.Jayendra Ratilal Modi, PW.13 at Exh.45, (13) Udesinh Prabhatsinh, PW.14 at Exh.48, (14) Investigating Officer Trikambhai Shankerdas Patel, PW.15 at Exh.50, and (15) Harikrushna Ghanshyambhai Patel, the then S.D.P.O, PW.16 at Exh.56. The prosecution had also produced documentary evidence, such as, complaint of Dansingbhai Nathabhai at Exh.65, panchnama of place of incident at Exh.18, report of Serologist at Exh.20, panchnama of clothes of injured complainant Dansingbhai at Exh.24, inquest held on the dead body of deceased Pratapsinh at Exh.25, inquest held on the dead body of deceased Udesinh at Exh.27, panchnama relating to seizure of clothes of the accused at Exhs. 28 & 29, panchnama of discovery of weapons at the instance of accused Kanubhai, Jagabhai and Dhirubhai at Exh.30, panchnama of identification parade relating to appellant No.5 at Exh.33, panchnama of identification of

appellant No.5 by dog at Exh.37, postmortem notes of deceased Pratapsinh at Exh.41, postmortem notes of deceased Udesinh at Exh.42, Vardhy receipts at Exhs.44, 49, 51 etc., injury certificate of injured complainant Dansingbhai at Exh.46, map of place of incident at Exh.57 etc. in support of its case against the appellants. After recording of evidence of the prosecution witnesses was over, the learned Judge had explained to the appellants circumstances appearing against them in the evidence of prosecution witnesses, and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973. In the further statement, defence of the appellants was that of total denial. However, the original complainant had submitted written submissions at Exh.60; whereas appellant Nos.1,2 & 5 had submitted written submissions at Exh.62, for consideration of Court.

4. After appreciation of evidence adduced by the prosecution and hearing the learned counsel of the parties, the Trial Court concluded that the evidence of the complainant and that of two eye witnesses was cogent, reliable and trustworthy, as there were no major discrepancies in their testimonies. The learned Judge of the Trial Court on analysis of the evidence led by prosecution concluded that it was proved by the prosecution beyond reasonable doubt that deceased Pratapsinh and deceased Udesinh had died homicidal death in the incident which had taken place in the sim of village Kavitha on May 6, 1994. The learned Judge on critical analysis of evidence held that it was proved by the prosecution that on the day of incident, the appellants had formed an unlawful assembly, the common object of which was to cause murder of the complainant and his relatives, and in furtherance of their common object, the appellants were guilty of rioting within the meaning of Section 147 of the Indian Penal code. According to the learned Judge, while indulging into rioting, appellant Nos.1 to 4 were armed with deadly weapons and were, therefore, liable to be convicted of the offence punishable under Section 148 of the Indian Penal Code. On assessment of evidence led by the prosecution, the learned Judge deduced that it was proved by the prosecution that in prosecution of the common object of unlawful assembly, appellant No.3 had caused murder of deceased Pratapsinh by inflicting knife blows and, therefore, appellant No.3 was liable to be convicted of the offence punishable under Section 302 of I.P.C.; whereas rest of the appellants were liable to be convicted of the offence punishable under Section 302 read with Section 149 of the Indian Penal Code. The

learned Judge also held that in prosecution of the common object of the unlawful assembly, appellant No.4 had caused murder of deceased Udesinh by inflicting knife blows and, therefore, he was liable to be convicted of the offence punishable under Section 302 of the Indian Penal Code; whereas rest of the accused were liable to be convicted of the offence punishable under Section 302 read with Section 149 of the Indian Penal Code. The learned Judge further held that it was proved by the prosecution that appellant No.1 had caused injury on left thigh and head of the complainant by means of dharia; whereas appellant No.2 had caused injury on right hand elbow of the complainant by means of dharia, but, the injuries were simple in nature and, therefore, they were liable to be convicted of the offence punishable under Section 324 of the Indian Penal Code; whereas rest of the appellants were liable to be convicted of the offence punishable under Section 324 read with section 149 of the Indian Penal Code. In view of the abovereferred to findings, the learned Judge has convicted the appellants of the offence punishable under Section 302 read with Section 149 of the Indian Penal Code as well as under Section 324 read with Section 149 of the Indian Penal Code, whereas appellant Nos.1 to 4 are also convicted under Section 148 I.P.C. and after recording conviction, the learned Judge has imposed sentences referred to earlier giving rise to instant appeal.

5. During the pendency of the appeal, the appellants had moved Criminal Misc. Application No.488 of 1997 and prayed the Court to direct that Mr.B.R.Patel, Executive Magistrate, Metropolitan area, Ahmedabad City, who had recorded statement of complainant Dansingbhai Nathabhai Rathod between 11.15 P.M. and 11.35 P.M. on May 6, 1994 as dying declaration be examined as a Court witness in Sessions Case No.237 of 1994. After hearing the parties, the Division Bench comprising N.J.Pandya & H.L.Gokhle,JJ., vide order dated February 7, 1997, had directed the Sessions Court to record testimony of Executive Magistrate Mr.B.R.Patel, and proceed further to prepare paper-book, as the appeal was already admitted. Pursuant to abovereferred to direction dated February 7, 1997, testimony of Baldevbhai Rambhai Patel was recorded as Court Witness No.1 at Exh.70, and the statement of complainant Dansingbhai recorded by Mr. B.R.Patel was produced on record of the case at Exh.71.

6. Mr.K.J.Shethna, learned counsel of the appellants contended that the first information report was recorded late after about 7 hours of the incident and report under Section 157 of the Code of Criminal Procedure was not

despatched to the learned Magistrate promptly, which renders the prosecution case doubtful and, therefore, conviction recorded should be set aside. According to the learned counsel of the appellants, the complaint was neither lodged promptly by the two labourers nor by Himatsinh to whom all the relevant facts were conveyed by the two labourers at the outskirts of village Kavitha nor by the complainant himself and as the accused have been falsely implicated in the case because of enmity, the prosecution case should be disbelieved. What was maintained was that though inquest on the dead body of deceased Udesinh was held on May 6, 1994 between 8.00 P.M. and 8.30 P.M. and inquest on the dead body of Pratapsinh was held between 9.00 P.M. and 9.30 P.M. in presence of witnesses belonging to village Kavitha, no names of the appellants were revealed to anyone at the earliest point of time, which makes the case of the prosecution highly doubtful. The learned counsel of the appellants argued that in Exh.44, which is Vardhi given by Civil Hospital to Shahibaug Police Station on May 6, 1994 as well as in Vardhi Exh.49, which was received by police head constable Udesinh Prabhatsinh, names of the appellants were not disclosed at all, nor names of the appellants were disclosed by the injured before the doctor, who had treated him, which makes the prosecution case against the appellants doubtful and, therefore, the appeal should be accepted. The learned counsel pointed out that Executive Magistrate Baldevbhai Patel had recorded statement of complainant Dansingbhai between 11.15 P.M. and 11.35 P.M., but crime register number was not mentioned in the said statement, which raises serious doubt as to whether the complaint of the complainant was, in fact, recorded at 9.30 P.M. and the appellants having been falsely implicated in the case because of enmity, the appeal should be allowed. On reference to the evidence of Dr.Modi, who had treated the injured complainant, it was pleaded that the complainant was never admitted as an indoor patient and was conscious all throughout, but had not lodged the complaint promptly and, therefore, the prosecution case should have been disbelieved by the learned Judge. What was highlighted was that Himatsinh, who was brother of the deceased and son of the complainant, was not examined as one of the witnesses by the prosecution with an oblique motive, though he was fully conversant with the facts of the case as conveyed to him by the two labourers and was also present at the hospital and, therefore, after drawing adverse inference against prosecution, case of the prosecution against the appellants should be disbelieved. While criticising the evidence of two labourers, namely, Dhanjibhai and Ramanbhai, it was argued that if the two

labourers had known the name of appellant No.5, then in Exh.18, which is panchnama of place of incident, labourer Dhanjibhai would not have referred to appellant No.5 as Kanubhai's relative and, therefore, it was doubtful whether, in fact, they had witnessed the incident. The learned counsel further submitted that joint recovery of weapons at the instance of original accused Nos. 1 to 4 between 11.30 P.M. and 3.00 P.M. is doubtful and, therefore, recovery of weapons of offence at the instance of appellant Nos.1 to 4 should not have been treated as an incriminating circumstance against the appellants by the learned Judge. The learned counsel of the appellants referred to in detail the evidence of investigating officer and pointed out that in view of defects committed by him in investigation, benefit of doubt should be accorded to the appellants. It was contended that evidence regarding identification parade adduced by the prosecution being feeble in nature should be discarded by the Court and the appellant No.5 deserves to be acquitted, as there is no other reliable evidence establishing his involvement in the incident in question. What was asserted was that appellant No.5 was neither known to the complainant before the incident nor known to two labourers, who were hailing from village Kavitha and as the complainant never knew as to who were assailants, at least the appellant No.5 is entitled to acquittal rendering conviction of rest of the appellants with the aid of Section 149 I.P.C., as bad in law, and as Section 34 I.P.C. is not pressed into service by the prosecution, the appellants should be convicted on the basis of principle of minimum liability. The learned counsel stressed that the learned Judge of the Trial Court has not properly appreciated the evidence in its proper perspective and, therefore, the appeal should be accepted.

7. Mr.A.Y.Kogje, learned Additional Public Prosecutor, pointed out that the incident in question had taken place at about 2.00 P.M., after which the injured were taken to the village in a tractor from-where they were removed to hospital and on doctor declaring two injured as dead before arrival, injured complainant was removed to Civil Hospital where he was treated and where his complaint was recorded and as there is no delay in lodging the complaint, the prosecution case is rightly believed by the learned Judge. In the alternative, it was argued that delay, if any, in lodging complaint stands satisfactorily explained by the evidence of the complainant read with the evidence of the investigating officer and, therefore, the appellants are not entitled to any benefit of doubt on the ground that there was

delay in lodging F.I.R. The learned counsel of the State Government referred to the evidence of injured complainant as well as two witnesses in detail, and argued that not only their evidence is cogent and consistent, but inspires confidence, as they have not narrated parrot like story before the Court and, therefore, conviction of the appellants based on their testimonies, should be upheld by this Court. The learned counsel of the State Government emphasised the reason as to why inquest is being held in a case of murder as well as importance of panchnama of place of incident in criminal trial, and emphasised that non-mention of crime register number therein is of little consequence, nor non-mention of crime register number would entitle the appellants to claim acquittal. According to the learned Additional Public Prosecutor, Himatsinh was not an eye witness and was conveyed information from others, and as his evidence would be hearsay evidence, his non-mention is of no consequence when prosecution case is unfolded by reliable and trustworthy evidence of the complainant and two other eye witnesses. What was asserted was that it was never suggested by the defence to any witness that before filing of the F.I.R., deliberations had taken place between the complainant and others, as a result of which, the appellants were falsely implicated in the case and as false implication is ruled out, appeal has no merits. It was argued that had there been deliberations before lodging of the complaint, appellant No.5 would not have been described as a relative of Kanubhai i.e. appellant No.1, but would have been named as such, which factor indicates that no part of evidence was concocted by the prosecution against the appellants and the appellants are not entitled to the benefit as claimed by the learned counsel of the appellants. It was emphasised on behalf of the State that in view of well reasoned judgment of the trial Court, conviction of the appellants is not liable to be set aside and the appeal should be dismissed.

8. We have considered the submissions advanced at the Bar and undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence with reference to broad reasonable probabilities of the case. The fact that deceased Pratapsinh and deceased Udesinh died homicidal death is not in dispute. Injured complainant Dansingbhai Nathabhai father of deceased Pratapsinh and deceased Udesinh, has stated in his testimony before the Court that his two sons were assaulted by the appellants and had received knife injuries. He is corroborated by eye witness Dhanjibhai and eye witness Ramanbhai. The

inquest panchnama of Pratapsinh produced at Exh.25 also mentions the injuries sustained by him. So also inquest panchnama relating to deceased Udesinh produced at Exh.27 mentions injuries sustained by him. Further, postmortem notes of deceased Pratapsinh are produced at Exh.41, wherein injuries sustained by him are mentioned in detail. Similarly, postmortem notes of deceased Udesinh produced at Exh.42 also contain details of injuries sustained by him. As per the postmortem notes, deceased Pratapsinh had died due to shock of haemorrhage, as a result of stab injuries sustained by him; whereas as per the postmortem notes of deceased Udesinh, he had died due to shock of haemorrhage consequent upon stab injuries sustained by him. Thus, this Court finds that the finding that deceased Pratapsinh and deceased Udesinh had died homicidal death, is eminently just and is hereby upheld.

9. Before dealing with the contentions raised at the Bar, it is relevant to notice that the prosecution has placed reliance on testimonies of injured complainant Dansingbhai Nathabhai and two eye witnesses, namely, Dhanjibhai and Ramanbhai, to prove case against the appellants. Therefore, it would be relevant to notice important features appearing from their evidence recorded before the Court. Dansingbhai Nathabhai, PW.1 Exh.16, has stated that the incident in question had taken place on May 6, 1994, and that in the morning, his two sons i.e. deceased Pratapsinh and deceased Udesinh had gone to his field for the purpose of sowing sugarcane. According to the complainant, he had gone to his field at about 11.00 A.M. and found that his two sons were sowing the crop and were being helped by two labourers, namely, Dhanjibhai and Ramanbhai. The witness has stated before the Court that the labourers belong to village Badarkha. According to him, after he reached his field, he was informed by his son Udesinh that in the morning at about 8.00 A.M., appellant No.1, appellant No.3 and appellant No.5 had entered field of the appellan No.1 in a tractor and damaged the crop, as a result of which he had scolded them, but he was threatened and asked to be in the field, as they were to return immediately. What is mentioned by this witness in his examination-in-chief is that at about 2.00 P.M. the appellants had come in a tractor which was driven by appellant No.5 and after alighting from the tractor, had started abusing and thereafter appellant No.3 had given two blows with knife to his son Pratapsinh. The witness has asserted that as his son Pratapsinh was assaulted by appellant No.3, his second son Udesinh had come rushing, but appellant No.5 had caught hold of him, after which appellant No.4 had given

blows with knife to his son Udesinh on chest etc. as a result of which he had also fallen down. The witness has further stated that the appellant No.1 had given dharia blows on his leg and head and when appellant No.2 had tried to cause injuries by means of dharia on his head, he had tried to ward off the said blow, as a result of which he had sustained injuries on elbow of right hand. The witness has informed the Court that thereafter the labourers, who were working quite nearby, had come at the place where his two sons were assaulted and, therefore, all the accused had run away in tractor with their weapons. According to this witness, thereafter his two sons along with him, were brought to the village in a tractor and his son Himatsinh had engaged a Matador in which they had come to Civil Hospital for treatment. The witness had stated before the Court that at the hospital both his sons were declared dead before arrival and he was admitted in hospital for treatment. According to this witness, he had lodged complaint. During the course of his testimony before the Court he identified all the accused, but stated that he had seen appellant No.5 on the date of incident and that he had identified him in the identification parade which was held during the course of investigation. The witness also identified dharias and knives which were used by the accused concerned in commission of crime.

10. In cross-examination by appellant Nos.1 and 2, the witness stated that he was not remembering whether he was accompanied by anyone-else when his two sons were declared dead on arrival. He also admitted that he had not given names of assailants to the doctor who had declared his sons dead on arrival and the explanation offered by him was that he was not questioned by the doctor as to who had assaulted his sons. He had also admitted that when he was examined by the doctor, the doctor had tried to know from him as to who had caused injury to him and that he had informed the doctor that he was injured by appellant No.1. In his cross-examination, he admitted that it was true that he was conscious when policemen and Mamlatdar had arrived in the Ward. The witness denied the suggestion made by the defence that he was injured after his two sons were assaulted. During the cross-examination, his attention was drawn to his statement which was recorded by Mamlatdar and after referring to the same, he stated before the Court that he was not remembering whether he had stated in the said statement that five persons had come to the field and at that time, his son Pratapsinh was making inquiry with them as to why tractor was brought in the field in the morning. The witness denied to have stated in his

statement before Mamlatdar that his son Udesinh had come running and that he was caught hold by one unknown person and appellant No.4. The witness agreed with the suggestion of defence and stated that he had no enmity against the appellants before the incident and that appellant No.1 had aimed revolver at him. He admitted that both his sons were bleeding profusely and that the clothes of both the labourers were blood-stained. He denied the suggestion made by the defence that his third son Himatsinh was present when his two sons were declared dead on arrival and that Himatsinh had informed the police about the incident. The witness denied the suggestion that he was not knowing the names of the assailants of his sons and, therefore, he had not given names of assailants to the doctor who had declared his sons dead on arrival. In cross-examination by original accused Nos. 3 & 4, the witness stated that he had sustained two injuries, but denied the suggestion that he had enmity with the family of appellant No.1-Kanubhai. He also denied the suggestion that those who had acted as panch witnesses were Rajput by caste. What was claimed in cross-examination by him was that at the outskirts of village Kavitha, he had perceived that probably Pratapsinh had died, but Udesinh was alive and, therefore, he had made his best attempts to see that Udesinh was removed to hospital immediately for treatment. What is most important is that in cross-examination by appellant No.5, he has admitted that "Gayjawala" field was purchased by him before five years and that on the boundary of the said field, there was land of Dhirubhai Gafurbhai, but denied the suggestion that appellant No.1 was entitled to purchase the field which was purchased by him. He also denied the suggestion that appellant No.1 and appellant No.2 had a right of way through his field. It is relevant to notice that on behalf of appellant No.5 it was never suggested to this witness that the witness was not known to him by face or that identification by this witness of the appellant No.5 was pre-planned etc.

11. Coming to the evidence of witness Dhanjibhai Mavjibhai, PW.3 at Exh.21, this Court finds that he belongs to village Badarkha and is harijan by caste. His evidence would indicate that he had studied upto 8th standard. According to him, the incident had taken place on May 6, 1994, and he in the company of his uncle Ramanbhai Somabhai had gone to the field of complainant Dansingbhai for the purpose of doing labour work. What is stated by the witness is that he had gone to the field of the complainant at about 8.00 A.M. and the appellant No.1 had gone to his field in a tractor in the company of

appellant Nos.3 & 5 through the field of the complainant, as a result of which altercation had taken place and the appellant Nos.1, 3 & 5 had threatened Pratapsinh. The witness has informed that at about 11.00 A.M., complainant Dansingbhai had brought lunch and at that time Udesinh had informed the complainant about the incident which had taken place in the morning. The witness has informed the Court that they had taken lunch by turn and at about 1.00 P.M. Pratapsinh had gone in tractor to the village for bringing tea for them. The witness has stated before the Court that thereafter Pratapsinh had come back to the field with tea and at about 2.00 P.M., all the appellants had come in a tractor which was driven by appellant No.5. The witness identified all the accused who were present in the Court room and stated that after alighting from the tractor, appellant No.3 had run towards Pratapsinh and given two blows with knife to Pratapsinh, as a result of which he had fallen down. The witness has further stated that appellant No.5 had caught hold of deceased Udesinh, after which appellant No.4 had caused knife injuries to him, as a result of which he had also fallen down. According to this witness, appellant No.1 had caused injuries to complainant Dansingbhai on his head and thigh, and that appellant No.2 had also raised dharia to inflict blow on the head of Dansingbhai, but Dansingbhai had tried to ward it off by raising his hands and, therefore, the blow had landed on the elbow of his hand. The witness has also asserted that when he along with his uncle had gone near the place where two injured were lying, the appellant No.1 had drawn revolver and tried to fire a shot, but could not succeed. The witness testified before the Court that all the appellants had run away in the tractor bearing registration No.GUD-5141 with their weapons and that the injured were brought to village in a tractor. According to this witness, he had informed Himatsinh, who is one of the sons of complainant Dansingbhai about the incident, and Himatsinh had asked him to remove the injured to hospital immediately. What is maintained by the witness before the Court is that thereafter the injured were removed to V.S.Hospital in a Matador, from where they were removed to Civil Hospital and at the Civil Hospital, complainant Dansingbhai was treated. The witness identified before the Court the knives which were used by appellant Nos.3 & 4 in the commission of crime as well as dharias used by appellant Nos.1 & 2. In his cross-examination by accused Nos.1 & 2, he admitted that he had narrated the full incident to Himatsinh and that his clothes and clothes of Ramanbhai were blood-stained, as they had lifted and placed the injured and the deceased in the tractor. The witness

stated in his cross-examination that he was sowing sugarcane crop in the east portion of the field and the incident had taken place at a distance of 60 feet therefrom. The witness admitted that he had not informed the policemen who were present at the Civil Hospital about the incident and that he was present in the hospital till about 5.00 A.M. in the morning of next day. He admitted that he had not stated in his police statement that he was with the injured when the injured were removed to V.S.Hospital. He admitted in his cross-examination that he had not seen appellant No.5 catching hold of Udesinh from behind. He asserted that he was knowing appellant No.5 since 12 months. According to him, the day of incident was his first day of work in the field of the complainant, but denied the suggestion made by the defence that he had not witnessed the incident. In cross-examination by accused Nos.3 & 4, the witness admitted that on the outskirts of village Kavitha, there is a hotel wherein snacks are being served, but stated that there was no person in the hotel, as it was noon. He admitted that when the tractor had reached outskirts of village Kavitha, only Himatsinh and driver of the Matador which was lying there, were present and none-else was present. The witness informed the Court that at the hospital he had not given particulars about the incident because nobody had asked him about the particulars of the injured. According to him, his paramount consideration was to remove the injured to the hospital to save them. The witness also admitted that when he was at the hospital, he had learnt that the police personnel from Bavla Police Station had come to the hospital and that he was called by the police at about 12.00 midnight and that his police statement was recorded in the Civil Hospital. The witness denied the suggestion that he had conspired with his uncle Ramanbhai as to whose name should be given as accused. In his cross-examination by appellant No.5, the witness stated that he was also discharging duties as Home-Guard, but denied the suggestion that his brother was serving in police department. In the case of this witness also what is relevant is that it was never suggested on behalf of appellant No.5 that appellant No.5 was not known to this witness or that the witness had any enmity with appellant No.5 and, therefore, was implicating the appellant No.5 falsely.

12. The last eye witness is Ramanbhai Somabhai, PW.4 Exh.22. In his examination-in-chief he has stated the facts which are stated by eye witness Dhanjibhai and, therefore, it is not necessary to refer to the same in detail. However, what is relevant is that this witness

has stated before the Court that he had filed complaint against the appellants with Bavla Police Station, as the appellants had threatened him after the incident. In his cross-examination by appellant Nos.1 & 2, the witness agreed with the suggestion made by the defence counsel that after Pratapsinh received knife injuries, his brother deceased Udesinh had started running to save him and at that time, appellant No.5 had caught hold of Udesinh. He also agreed with the suggestion made by the defence counsel that when the appellant No.5 had caught hold of deceased Udesinh, at that time Udesinh had received 6-7 blows by means of a knife. The suggestions which were made on behalf of accused Nos.1 & 2 and which are accepted by this witness would indicate that the case of the prosecution is almost admitted by the defence. The witness also agreed with the suggestion made by the defence that his clothes and clothes of Dansingbhai were blood-stained and that he had informed Himatsinh about the incident. The witness admitted that at V.S.Hospital, he had seen police constables, but had not informed them about the incident. In cross-examination by accused Nos.3 & 4, the witness has stated that police personnel from Bavla Police Station had come to the hospital at 12.00 midnight and, therefore, his police statement was recorded after 12.00 midnight. The most astonishing fact is that this witness was not cross-examined at all by appellant No.5, meaning thereby, identification of appellant No.5 by this witness was never disputed.

13. The plea that there is delay in lodging the complaint as well as delay in forwarding report to the learned Magistrate under Section 157 of the Code of Criminal Procedure, 1973 and, therefore, the prosecution case should be disbelieved has no substance. As is evident from the testimonies of the witnesses, the incident had taken place at about 2.00 P.M. in the field which is 1 KM away from the village. After the incident, the injured were taken to the village in a tractor. From the village, they were removed to V.S.Hospital and from V.S.Hospital, they were taken to Civil Hospital. The complainant, who is father of the two deceased, has stated that he had inclination that his one son had died, but his another son was alive and, therefore, he had made his best attempts to see that his son Udesinh was saved anyhow. It is well settled that delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are, this Court cannot expect the complainant and others who are villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who had witnessed the occurrence cannot be expected to

act mechanically with all the promptitude in giving the report to the police. At times being grief-sticken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report. Of course, the Supreme Court has pointed out that in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger to such innocent persons, the Courts have been cautioned by the Supreme Court to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so, the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the Court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. In instant case, there are three eye witnesses. They have consistently deposed that two appellants had inflicted injuries on two deceased with knives. The complainant himself was injured and he has also deposed that he was injured by appellant Nos.1 & 2. All the three witnesses have consistently stated before the Court that appellant No.5 had caught hold of deceased Udesinh, after which he was fatally assaulted by appellant No.4. It was never suggested to the complainant that after deliberations he had lodged the complaint to implicate the appellants falsely. The suggestion made to Ramanbhai, who is one of the labourers, that he had deliberated with another labourer viz. Dhanjibhai for giving names of the appellants as accused, is of no consequence because the record does not indicate that there was any enmity between the appellants who belong to village Kavitha and the two labourers, who belong to village Badarkha. However, on receipt of Vardhi from Ahmedabad Rural control-room, the P.S.I. of Bavla Police Station had gone to village Kavitha and arranged bandobast in the village to see that peace was maintained in the village. His evidence would indicate that thereafter he had gone to the hospital and recorded complaint of the complainant. On overall view of the matter, this Court is satisfied that the first information report is neither result of deliberation by the complainant with any one, nor story is fabricated therein as suggested by the defence. Delay, if any, stands satisfactorily explained by the evidence of the complainant, two eye witnesses and the investigating officer and has no vitiating effect on the prosecution case at all. Therefore, the appellants are not entitled

to acquittal on the ground that there is delay in lodging the FIR. So far as report to be forwarded to the Magistrate under Section 157 of the Code is concerned, this Court finds that there was some lethargy on the part of the police officers in forwarding report to the learned Magistrate, but that by itself would not justify acquittal of the appellants more particularly when it was never suggested to the complainant that the complaint was result of deliberations. Thus, the first contention has no merits and is hereby rejected.

14. The plea that Himatsinh, who was important witness, is not examined with an oblique motive and, therefore, after drawing adverse inference, benefit should be given to the appellants, is devoid of merits. It is well to remember that it is not the case of prosecution that Himatsinh had witnessed the incident. The evidence on record would indicate that he was informed about the incident by two labourers. Had he been examined as one of the witnesses, his evidence would have been termed as hearsay. Further, after unfolding of prosecution story by the three witnesses including the injured complainant, a purshis was submitted by the prosecution for dropping of witnesses including Himatsinh and acceptance of the same by the Trial Court was never challenged by the appellants. Even at the appellate stage, the appellants had filed an application seeking direction from the High Court to examine Executive Magistrate, who had recorded alleged dying declaration of the complainant, but no request was made to examine Himatsinh. No application was submitted by the defence to examine Himatsinh either as witness of the accused or as Court witness. Having regard to the facts of the case, this Court is of the view that non-examination of witness was not deliberate, nor any benefit can be granted to the appellants on this score more particularly when the prosecution story stands unfolded by the evidence of three reliable and trustworthy witnesses. The criticism advanced against the testimonies of two labourers has no substance. While appreciating the evidence, cultural and educational background etc., of a witness cannot be ignored. It is well to remember that both the labourers hail from backward area and are illiterate. They are working as labourers. Therefore, there are bound to be discrepancies in their evidence. However, on close scrutiny of their evidence, this Court finds that there are no major discrepancies in their evidence before the Court and they have deposed about the incident in most natural manner, as they had witnessed the same. Both of them have asserted before the Court that their clothes were blood-stained because they had

lifted and placed the injured in the tractor. Non-seizure of their blood-stained clothes cannot be termed as their fault and their evidence does not become doubtful on this ground. Their evidence does not indicate that they had any special interest in the deceased or the complainant, except the fact that they were rendering their services for a price. Their presence at the place of incident is beyond doubt because they were doing the work of sowing sugarcane. Their evidence does not indicate that they have gone out of way to help the prosecution and deposed falsely against the appellants, because the evidence on record clinchingly establishes that they had no grudge against any of the appellants whatsoever. The learned Judge of the trial Court, who had advantage of observing demeanour of these two labourers, has found, as a matter of fact, that their evidence is trustworthy and inspires confidence of the Court. In absence of special circumstance having been pointed out to this Court, this Court had no reason or occasion to record a finding that their reliable evidence should not have been acted upon by the trial Court. The trial Court has rightly believed these two witnesses while accepting the case of the prosecution against the appellants.

15. The plea that identification of appellant No.5 is in serious doubt and, therefore, conviction of the appellants recorded with the aid of Section 149 of I.P.C. should be set aside, has no substance at all. As observed earlier, it was never suggested on behalf of appellant No.5 to injured complainant Dansingbhai that he was not known to him or that identification parade which was held was a farce and at the identification parade, the complainant had failed to identify him. So also, it was never suggested to eye witness Dhanjibhai Mavjibhai PW.3 Exh.21 on behalf of the appellant No.5 that the witness was not knowing appellant No.5 or that he was falsely implicated. In fact, cross-examination by appellant No.5 of this witness would indicate that two or three formal questions were put to him, which had no bearing regarding identification of the appellant No.5 by this witness at all. What is astonishing is that the case of Ramanbhai Somabhai, PW.4 Exh.22, that all the appellants had come to the field of the complainant in a tractor and that after alighting from the tractor, first of all deceased Pratapsinh was assaulted by appellant No.3 and thereafter deceased Udesinh had rushed to save his brother and at that time, appellant No.5 had caught hold of Udesinh, who was thereafter assaulted by accused No.4 with knife, is not challenged at all. In fact, this witness was not cross-examined on behalf of the appellant

No.5 at all. Further, evidence of Rajnikant Prahladji Trivedi, PW.9 Exh.34, Executive Magistrate, who had held identification parade, would indicate that all the precautions were taken before holding identification parade and no prior opportunity whatsoever was made available to the complainant before he had identified the appellant No.5 in the identification parade. It may be stated that holding of identification parade had become necessary because the complainant in his complaint and statement which was recorded by the Executive Magistrate, had referred to fifth person as a relative of appellant No.1, and had not named the said fifth person. The evidence of panch Gulam Dastnia Gulam Husen, PW.10 Exh.36, who was one of the panchas at the time when the identification parade was held, would indicate that all precautionary measures were taken to see that the complainant had no prior opportunity of seeing the appellant No.5. The evidence of panch witness further shows that the appellant No.5 was offered to change his clothes and that the appellant No.5 was correctly identified by the complainant. On overall view of the matter, this Court is satisfied that involvement of appellant No.5 in the crime in question is beyond doubt and the appellants are not entitled to any benefit on the ground that involvement of appellant No.5 in the incident was doubtful.

16. On the facts and in the circumstances of the case, the learned trial Judge has rightly recorded the finding of fact that Vardhi Exh.51 is not F.I.R. in the case, but the complaint lodged by the complainant is first information report in the case. In this regard, it is relevant to notice that Bavla Police Station had received an information from Ahmedabad Rural Control on May 6, 1994 to the effect that three persons had received injuries in a quarrel which had taken place at village Kavitha, out of whom two had died. In this information, names of the deceased were not conveyed, nor nature of injuries was mentioned, nor names of the assailants were mentioned. It is well settled that any telephonic information about commission of cognizable offence, irrespective of nature and details of such information, cannot be treated as F.I.R. The station diary entry recording information regarding quarrel without naming the injured persons or accused or nature of injuries, cannot be termed as F.I.R. Therefore, the well reasoned finding recorded by the learned Judge of the trial Court that the complaint lodged by the complainant Dansingbhai is first information report in the case is hereby upheld. So far as joint discovery of weapons is concerned, it is true that joint discovery of weapons should not have been

resorted to by the investigating officer, but on that count, discovery does not become doubtful. The places from which weapons have been discovered, were not accessible to one and all. The report of serologist would indicate that the knives used in the commission of offence had the same blood group as that of the deceased. Discovery of blood of the same group on the weapons of offence would indicate that the accused were in close proximity of the two deceased when they were fatally wounded. This is also an incriminating circumstance regarding which no explanation is offered by any of the appellants.

17. The contention that inquest panchnama does not mention the names of the accused, nor crime register number and, therefore, the prosecution case should be disbelieved, has no merits. Inquest on dead body in a murder case is held to ascertain injuries sustained by the deceased. In this case, the first information report was lodged by the complainant later on. Non-mention of crime register number in inquest panchnama, therefore, is of no consequence.

18. The plea that the complainant had failed to give details of assault on him to the doctor or details of assault on his sons to the doctor and, therefore, the prosecution case should be disbelieved, can hardly be accepted. It is well settled that the doctors before whom dead bodies are produced or injured persons are brought, take dying declaration or hold postmortem immediately and if they start examining the informant, they are likely to become witnesses of the occurrence, which is not possible. Further, it is not the duty of the doctors to ascertain from the injured as to who had caused injuries to him. Normally, doctors are ascertaining from the injured as to by which weapons the injury was caused so that course of treatment to be meted out to the injured can be chalked out. Non-disclosure of details of the incident before the doctor is of no consequence having regard to the facts of the case. Further, it is relevant to notice that two doctors, who are examined in the case, had themselves not performed autopsy on the dead bodies and had deposed before the Court on the basis of official records available.

Under the circumstances, conviction recorded cannot be set aside on the ground that the complainant had failed to disclose details of the incident before the doctor, who had declared his sons dead on arrival or to the doctor who had treated him.

19. The plea that Yadi was sent to the Executive Magistrate requiring him to record statement of injured Dansingbhai at 11.15 P.M. which indicates that the investigating officer had not reached the hospital before that time and, therefore, the whole case is concocted against the appellants, is devoid of merits. It is relevant to notice that police constable, who had carried the Yadi with him, must have taken his own time to reach the residence of the Executive Magistrate, who was supposed to record dying declaration of the injured complainant. The record does not show that the complaint was recorded after 11.15 P.M. and that thereafter time of recording was changed. Merely because Yadi to record statement of injured Dansingbhai was received by the Executive Magistrate at 11.15 P.M., one cannot jump to the conclusion that the investigating officer must not have reached the hospital before that time, more particularly in absence of any long standing enmity between the injured complainant and the appellants, or any grudge whatsoever between the two labourers and the appellants.

20. The net result of the above discussion is that this Court finds that the conviction of the appellants is well-founded and no ground is made out by the learned counsel of the appellants to interfere with the judgment impugned in the appeal. After analysing, shifting and assessing the evidence on record with particular reference to its trustworthy and truthfulness by process of dispassionate judicial scrutiny, this Court finds that well reasoned conviction of the appellants recorded by the trial Court must be upheld. The appeal is, therefore, liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed. Bail bonds of the appellants, who are on bail, be cancelled immediately so that they undergo sentence imposed by the trial Court, which is confirmed by this Court. They shall surrender before the competent Court on or before November 1, 2003. Muddamal to be disposed of in terms of judgment impugned in the appeal.

(J.M.Panchal,J.)

(Sharad D.Dave,J)

(patel)